In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Response in Opposition to Petition for Writ of Certiorari.

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Opinion Below.

The opinion of the Supreme Court of Rhode Island is reported as *State* v. *Innis*, 391 A. 2d 1158 (R.I. 1978), and is reprinted in the appendix (pp. 1a-29a) to the petition for certiorari.

Jurisdiction.

The respondent agrees with the statement of jurisdiction as it appears in the petition for certiorari.

Question Presented.

Whether as a matter of fact the Providence police deliberately attempted to elicit incriminating information from the respondent after he had requested to see a lawyer and whether, having requested assistance of counsel, the respondent waived his constitutional protections prior to divulging the information later used against him at trial.

Constitutional Provisions Involved.

The respondent agrees with the denotation of constitutional provisions appearing in the petition for certiorari (the Fifth and Fourteenth Amendments to the Constitution of the United States).

Statement of the Case.

The respondent agrees with the statement of prior proceedings as reported in the petition for certiorari.

Statement of Facts.

At 4:30 in the morning, on January 17, 1975, the respondent, Thomas J. Innis, was arrested and handcuffed by the Providence police. After being three times advised of his *Miranda* rights, and at least once stating that he understood these rights, Mr. Innis requested to see an attorney. Captain Leyden of the Providence police then ordered three of his subordinates, Officers Gleckman, McKenna, and Williams, to place the respondent in the rear of a caged four-door sedan and to take him to the Central Station. He further directed these officers not to question Mr. Innis or to intimidate or coerce him in any way.

The three officers disagreed in their testimony as to whether Officer Gleckman drove the vehicle or whether he was in the back seat with the respondent. Whatever the seating arrangements, it is undisputed that, at some point during the rapidly aborted ride to the Central Station, Officer Gleckman made a number of remarks, allegedly addressed to Officer McKenna, which he summarized as follows:

> A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

His brother officers expanded on some of the details of Officer Gleckman's statements and their responses. Officer McKenna indicated that he answered Gleckman with something to the effect that,

> we should, you know, continue to search for the weapon and try to find it.

Officer Williams remembered Gleckman as saying,

> It would be too bad if the little — I believe he said a girl — would pick up the gun, maybe kill herself.

The respondent heard all of the remarks summarized in the above testimony. While the precise language and extent of Officer Gleckman's comments cannot be gleaned from the record, all three officers stated that no direct questions were addressed to Mr. Innis and that they had traveled a little less than a mile when the respondent burst out with,

> Stop the car. Turn around and I'll show you where the gun is.

Mr. Innis did not testify at all.

On returning to the scene of the arrest, Captain Leyden again gave the respondent his *Miranda* warnings, and Mr. Innis agreed to lead the officers to the shotgun. Concluding that the "real issue [was], did this defendant have the benefit of his *Miranda* Warnings [*sic*]" (Pet. App. 33a), the trial justice found that Mr. Innis had been advised of his rights and that he had waived them. The State was then permitted to introduce into evidence the shotgun, the statement and police testimony regarding the circumstances of its finding. Following his conviction for robbery, kidnapping and felony murder, the respondent appealed to the Supreme Court of Rhode Island.

On appeal Mr. Innis raised seven issues, five of which were not reached by the court, including a claim that the motion to suppress should have been granted under R.I. Const. Art. I, § 13. Instead, relying primarily on *Miranda* v. *Arizona*, 384

U.S. 436 (1966), and a number of Rhode Island decisions construing that opinion, the court concluded that Officer Gleckman impermissibly attempted to elicit incriminating information from the respondent immediately after Mr. Innis had invoked his right to counsel, that the respondent's inculpatory response was the product of "subtle compulsion," and that discovery of the shotgun was the direct fruit of these illegal endeavors. The court held that the shotgun and the statement leading to its discovery were improperly admitted; it sustained the respondent's appeal on this ground and remanded the case for a new trial.

Reasons for Not Granting the Writ.

The respondent argues the following reasons why the writ of certiorari should not be issued:

1. The point of dispute between the petitioner and the Supreme Court of Rhode Island is one of fact and not one of federal constitutional law.

2. The state Supreme Court's decision is not in conflict with federal cases or those from other state jurisdictions; moreover, the petition does not indicate that the lower federal courts or the state courts are having difficulty applying the pronouncements of this Court to similar cases.

3. The decision of the Supreme Court of Rhode Island is based on a routine rendition of the standards laid down in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

I. The Petition for Writ of Certiorari is Premised upon a Factual Contention which was Rejected by a Majority of the Supreme Court of Rhode Island.

The principal issue in this case is factual and not legal in nature. The State of Rhode Island argues to this court, just as it argued to the State Supreme Court, that Officer Gleckman's comments were but casual conversation not intended for the respondent's ears. Mr. Innis contends, as he has always contended, that Officer Gleckman's comments were a deliberate attempt to elicit incriminating information from an exhausted suspect, arrested at 4:30 in the morning and confined in a small space with three of his captors. On the record below, which contained no more than a synopsis of the interchange between the three officers, the factual question presented to the Supreme Court of Rhode Island was admittedly a difficult one. It was resolved, however, against the State with a majority finding that Thomas Innis unearthed the shotgun as a result of "subtle compulsion" engendered by remarks deliberately calculated to produce an inculpatory response. *State* v. *Innis*, *supra*, at 1162, 1163 (Pet. App. 7a, 9a). Two justices dissented, not because they disagreed with the majority's statement of law, but because they could not accept its reading of the facts.

The petitioner nevertheless characterizes the decision below as holding that a police officer's innocent observation, overheard by a suspect in custody who has requested the assistance of counsel, renders inadmissible a later voluntary act of self-incrimination (Pet., p. 8). Moreover, despite four pages in the majority opinion discussing the question whether in fact the respondent waived his constitutional protections and ultimately concluding that he did not, the petitioner nevertheless claims that the court precluded waiver as a matter of federal constitutional law (Pet., p. 8) and even that it

mandated suppression "in spite of [an] affirmative waiver of these rights" (Pet., p. 10). Only by thus replacing the majority's findings of fact with its own view of what happened on January 17, 1975, can the petitioner suggest to this Court that Rhode Island has adopted a *per se* rule of exclusion once a suspect invokes his constitutional protections. Nowhere does the majority opinion suggest that an innocent remark by a police officer constitutes impermissible interrogation, but only that Officer Gleckman's remarks were not innocent. Nowhere does the majority hold that the respondent could not have waived his constitutional protections, but only that he did not.

II. The Decision of the Supreme Court of Rhode Island has Not been Shown to Conflict with Holdings of Other State Courts or of the Lower Federal Courts and this Court's Further Guidance in this Area is Not Required.

The petition alleges that the holding of *State* v. *Innis*, 391 A. 2d 1158 (R.I. 1978), is in conflict with other state and federal decisions (Pet., p. 7). The petitioner cites no other state or lower federal court cases in support of this assertion. There is no reason to believe that state courts or lower federal courts are having difficulty applying the teachings of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Michigan* v. *Mosley*, 423 U.S. 96 (1975), to various fact situations or that they require this Court's intercession to resolve disputes of law. Further, there are no disputes of law involved in this case, as it called only for the application of settled principles in a somewhat unusual factual context which is unlikely to arise again. Only by mischaracterizing the decision of the State Supreme Court can the petitioner demonstrate a misapplication of this Court's prior decisions to the *Innis* facts: As explained *infra*, the State Supreme Court did not even intimate that a suspect in Innis'

circumstances could not waive his Fifth Amendment privilege after invoking a right to counsel; the court expressly and clearly found only that the facts as adduced at trial did not sustain the government's burden of proving waiver in this particular case. The standard used to determine waiver was correct and does not conflict with decisions of this Court or of other courts.

III. The Supreme Court of Rhode Island Applied Settled Principles of Federal Constitutional Law to the Facts as it Found Them.

Once it is accepted that Officer Gleckman deliberately elicited an inculpatory response from the respondent, the decision below becomes nothing more than a routine application of the principles enunciated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and later refined in *Michigan* v. *Mosley*, 423 U.S. 96 (1975). *Miranda* holds that:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
>
> . . . . . .
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. *Arizona*, *supra*, at 474-475. "Interrogation" within the meaning of *Miranda* cannot be limited to sentences addressed to the suspect which end with question marks. The

term clearly encompasses any deliberate verbal attempt to elicit incriminating information by identifiable law enforcement officers. *Brewer* v. *Williams*, 430 U.S. 387 (1977). Where Officer Gleckman began his calculated remarks within minutes of the respondent's invocation of his right to counsel, in no sense did the police "scrupulously honor" his constitutional protections as is required by *Michigan* v. *Mosley*, 423 U.S. 96, 104 (1975). Moreover, *Miranda* and *Mosley* aside, the Supreme Court of Rhode Island concluded as a matter of fact that the defendant's inculpatory behavior was not voluntary, but rather was subtly compelled by Officer Gleckman's comments. *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960).

Nor, as the petitioner argues, did the Supreme Court of Rhode Island hold that the respondent could not waive his rights having once invoked them. It held only that on the facts of the instant case the State had not satisfied its heavy burden of establishing a waiver of a fundamental constitutional right. *Miranda* v. *Arizona*, *supra*, at 444; *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

In sum, nothing in the opinion suggests a deviation from or an expansion of any federal constitutional standard. The Supreme Court of Rhode Island merely applied settled principles of law to a factual predicate with which the State continues to disagree.

As to suppression of the shotgun, the assertion by the petitioner that this Court has never condoned "extension" of the rationale of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), to a Fifth Amendment case to exclude derivative evidence is incorrect and reveals a misunderstanding of this Court's pronouncements. This Court has applied a "fruits" exclusionary rule to evidence obtained through exploitation of an unlawful confession, *Harrison* v. *United States*, 392 U.S. 219, 222, 226 (1968), and has recently reaffirmed the theoretical appro-

priateness of this doctrine in a Fifth Amendment context. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) ("In a proper case this rationale [deterrence of improper police conduct by exclusion of derivative evidence] would seem applicable to the Fifth Amendment context as well."). See *Massachusetts* v. *White*, ____ U.S. ____, 58 L. Ed. 2d 519 (1978), reh. den. ____ U.S. ____ (No. 77-1388, January 22, 1979). The State's reliance on the holding of *Michigan* v. *Tucker, supra,* is misplaced; the case at bar does not involve good faith police action with an "inadvertent disregard" of the prophylactic warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), but rather police remarks constituting a "highly improper" subjection of the respondent to "subtle compulsion." *State* v. *Innis, supra* at 1163, 1162 (Pet. App. 9a, 7a). Unlike the situation in *Michigan* v. *Tucker, supra,*

> [t]his is not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own.

State v. *Innis, supra* at 1163 (Pet. App 9a).

Finally, this case is different from most others in that the "derivative" evidence was the precise object of the improper police questioning; the inculpatory admission was only the respondent's offer to lead them to the weapon. The shotgun was thus more of a primary product of the illegal interrogation than an incidental, unanticipated result of a full confession.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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